

1992

Dawn Alumbaugh v. Utah State Insurance Department, Harold C. Yancey : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brent A. Burnett, Assistant Attorney General; Attorney for Appellee.

David H. Schwobe; Perkins, Schwobe, and McLachlan; Attorney for Appellant.

Recommended Citation

Reply Brief, *Alumbaugh v. Utah State Insurance Department*, No. 920656 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4642

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCKET NO. 920656

PERKINS, SCHWOBE & McLACHLAN
David H. Schwobe (#2893)
Attorney for Appellant
343 South 400 East
Salt Lake City, Utah 84111
Telephone (801) 521-0177

IN THE UTAH COURT OF APPEALS

* * * * *

DAWN ALUMBAUGH,	:	
Plaintiff/Appellant,	:	
vs.	:	
UTAH STATE INSURANCE	:	
DEPARTMENT, by and through	:	
its Commissioner and	:	Case No. 920656-CA
Authorized Representative,	:	
HAROLD C. YANCEY,	:	Category No. 15
Defendant/Appellee.	:	

* * * * *

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District
Court of Salt Lake County, the Honorable Richard H. Moffat

Brent A. Burnett
Assistant Attorney General
Attorney for Appellee
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

David H. Schwobe
PERKINS, SCHWOBE & McLACHLAN
Attorney for Appellant
343 South 400 East
Salt Lake City, Utah 84111
Telephone: (801) 521-0177

APR 19 1993

PERKINS, SCHWOBE & McLACHLAN
David H. Schwobe (#2893)
Attorney for Appellant
343 South 400 East
Salt Lake City, Utah 84111
Telephone (801) 521-0177

IN THE UTAH COURT OF APPEALS

* * * * *

DAWN ALUMBAUGH,	:	
Plaintiff/Appellant,	:	
vs.	:	
UTAH STATE INSURANCE	:	
DEPARTMENT, by and through	:	
its Commissioner and	:	Case No. 920656-CA
Authorized Representative,	:	
HAROLD C. YANCEY,	:	Category No. 15
Defendant/Appellee.	:	

* * * * *

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District
Court of Salt Lake County, the Honorable Richard H. Moffat

Brent A. Burnett
Assistant Attorney General
Attorney for Appellee
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

David H. Schwobe
PERKINS, SCHWOBE & McLACHLAN
Attorney for Appellant
343 South 400 East
Salt Lake City, Utah 84111
Telephone: (801) 521-0177

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF FACTS	2
ARGUMENT	
POINT I THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES	3
POINT II THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIM UNDER 42 USC SECTION 1983.	6
POINT III THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S STATE DUE PROCESS CLAIM	8
POINT IV THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIM FOR BREACH OF CONTRACT ...	13
CONCLUSION	17
CERTIFICATE OF MAILING	17

AUTHORITIES AND CASES CITED

	<u>Page</u>
<u>Bennett v. Bow Valley Development Corp.,</u> 797 P.2d 419 (Utah 1990).....	11
<u>Berube v. Fashion Centre, Ltd.,</u> 771 P.2d 1033 (Utah 1989).....	14
<u>Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.,</u> 403 U.S. 388, 91 S.Ct. 1999 (1971).....	9
<u>Bush v. Lucas,</u> 462 U.S. 367, 103 S.Ct. 2404 (1983).....	10
<u>Coleman v. Utah State Land Bd.,</u> 795 P.2d 622 (Utah 1990).....	9
<u>Condemarin v. University Hosp.,</u> 775 P.2d 348 (Utah 1989).....	10
<u>Convalescent & Care Inst. v. Industrial Com'n,</u> 649 P.2d 33 (Utah 1982).....	10
<u>Davis v. Passman,</u> 422 U.S. 228, 99 S.Ct. 2264 (1979).....	10
<u>El Rancho Enterprises v. Murray City Corp.,</u> 565 P.2d 778 (Utah 1977).....	11
<u>Fugitt v. City of Placentia,</u> 130 Cal. Rptr. 123 (Cal. App. 1977).....	16
<u>Gill v. Timm,</u> 720 P.2d 1352 (Utah 1986).....	8
<u>Hansen v. White,</u> 947 F.2d 1378 (9th Cir. 1978).....	16
<u>Hatton-Ward v. Salt Lake City Corporation,</u> 828 P.2d 1071 (Utah App. 1992).....	5
<u>Helgevold v. Civil Service Com'n.,</u> 367 N.W.2d 257 (Iowa App. 1985).....	16

<u>Kentucky v. Graham,</u> 473 U.S. 159 (1985)	7
<u>Local No. 8 v. City of Great Falls,</u> 568 P.2d 541 (Mont. 1977)	16
<u>Longshore v. county of Venture,</u> 157 Cal. Rptr. 706 (Cal. 1979)	16
<u>Piacitelli v. Southern Utah State College,</u> 636 P.2d 1063 (Utah 1981)	14
<u>Thurston v. Box Elder County,</u> 835 P.2d 165 (Utah 1992)	14
<u>Untermeyer v. State Tax Com'n,</u> 129 P.2d 881 (Utah 1942)	10
<u>Wiles v. State Personnel Board,</u> 121 P.2d 673 (Cal. 1942)	16
<u>Will v. Michigan,</u> 491 U.S. 58 (1989)	6

DETERMINATIVE AUTHORITIES

Alumbaugh submits that the following constitutional provisions, statutes and rules are determinative of certain issues in this Appeal:

Constitution of Utah, Article I, Section 7.

Utah Grievance and Appeal Procedures Act, UCA Section 67-19a-101 to 67-19a-408.

The content of these authorities is set forth verbatim in the Addendum to Alumbaugh's principal Brief, dated January 13, 1993.

ISSUES PRESENTED FOR REVIEW

Within pages 1 and 2 of its Brief, dated March 17, 1993, the Appellee ("Defendant") has set forth an alternative Statement of the Issues Presented for Review, although Defendant has indicated no dissatisfaction with Appellant's ("Alumbaugh") statement of the issues within her principal Brief.

Alumbaugh objects to Defendant's Statement of the Issues on the grounds that Defendant's Issues 1 and 2 are redundant, and on the grounds that Defendant's Issues fail to address some of the key issues which Alumbaugh raised in her principal Brief; for example, Defendant does not address Alumbaugh's argument that she has exhausted her administrative remedies by pursuing such remedies up to the level of judicial review; nor does Defendant address Alumbaugh's argument that her statutory administrative remedies are futile because the Utah Grievance and Appeal Procedures Act provides no remedy or enforcement mechanism for the injuries alleged by Alumbaugh; nor does Defendant address Alumbaugh's argument that she is not required to exhaust her statutory administrative remedies prior to bringing her constitutional and common-law claims because such claims are independent from Alumbaugh's statutory remedies.

Defendant raises two issues in its Brief that were not raised in the District Court or in Alumbaugh's principal Brief. First, Defendant argues at page 5, note 1, and page 14, that Harold C. Yancey, in his official capacity, has not been named as.

a Defendant in this action. Second, Defendant argues on pages 14-18 and 21-22 of its Brief that Alumbaugh's claims under the Utah Constitution and for breach of contract are barred by the notice of claim provisions of the Utah Governmental Immunity Act, 63-30-1 et seq. These new issues will be addressed below.

STATEMENT OF FACTS

Defendant sets forth an alternative Statement of Relevant Facts on pages 4-5 of its Brief, although Defendant does not indicate any disagreement with the Statement of the Facts appearing on pages 4-15 of Alumbaugh's Brief.

Alumbaugh objects to Defendant's Statement of Relevant Facts on the grounds that it consists mostly of legal argument. For example, Defendant's Statement of Facts contains the following:

Without awaiting a final resolution of her grievance procedure, plaintiff filed the instant action alleging that her constitutional rights to due process were violated under both the federal and state constitutions. The sole defendant in this action is the "Utah State Insurance Department. . . ." Ms. Alumbaugh's petition for judicial review of the administrative grievance process has yet to be resolved. (Footnote deleted.)

Elsewhere in its Brief, Defendant erroneously states that Alumbaugh's claims in this action arise from alleged deficiencies in her administrative grievance procedures. For example, on page 10 of its Brief, Defendant states:

Further, in Hatton-Ward, the Court expressly pointed out that Mr. Hatton-Ward was not seeking reinstatement or any other relief related to the administrative grievance process. Instead, it was the defendant who claimed that the plaintiff must first go through the administrative process before filing a separate, distinct, cause of action unrelated in any manner to the administrative process. But Ms. Alumbaugh, rather than bringing an entirely separate cause of action, is instead claiming that she was denied contractual, state, and federal constitutional due process in the administrative grievance process.

Plaintiff alleges that her constitutional and contractual rights to due process were violated by the manner in which the prior administrative proceeding was handled. (Emphasis in original.)

Alumbaugh repeatedly stated both in the District Court and in her principal Brief that her present claims do not involve any alleged deficiencies in her administrative grievance process. In fact, Alumbaugh will concede, *arguendo*, for purposes of this Appeal, that there were no deficiencies in her administrative grievance procedure. Her present claims all involve alleged misconduct by her employer, the Utah State Department of Insurance, in involuntarily transferring Alumbaugh, in giving her a derogatory performance evaluation, and in excluding her from consideration for a promotion.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Alumbaugh argued in the District Court and in her principal Brief three reasons why her claims should not be dismissed for

failure to exhaust administrative remedies, none of which have been addressed by Defendant. They are:

1. That Alumbaugh has fully exhausted any administrative remedies that might be required in this case. The fact is undisputed that Alumbaugh pursued her grievance through the first four levels of the grievance procedure, and then timely appealed to the Utah Career Service Review Board, which held that it had no jurisdiction over Alumbaugh's claims. It is undisputed that Alumbaugh's only avenue of redress at this point is in the District Court. Since that is the case, Alumbaugh's administrative remedies have been exhausted and she should be allowed to proceed in the District Court with any claims which are appropriate in that forum.

2. Alumbaugh should be excused from exhausting her administrative remedies because such remedies are futile. Alumbaugh argued in the District Court and in her principal Brief, and Defendant has not disputed, that the Utah Grievance and Appeal Procedures Act contains only sparse and indirect references to any remedies, none of which are applicable to Alumbaugh, and contains no enforcement mechanism. Alumbaugh should not be required to further exhaust a process which provides her with no potential remedy.

3. Alumbaugh is not required to exhaust her administrative remedies under the Grievance and Appeal Procedures Act prior to

bringing her present claims, because her present claims are independent and distinct from her statutory remedies. This Court held in Hatton-Ward v. Salt Lake City Corporation, 828 P.2d 1071 (Utah App. 1992) that it is not necessary for civil service employees to exhaust their administrative remedies where they seek independent remedies outside of the administrative process. Essential to the Court's analysis in Hatton-Ward was the fact that the civil service statute involved in that case provided only limited remedies, of a different nature than those sought by the Plaintiff in his independent action. Id. at 1073.

Defendant's sole response to Hatton-Ward is to state that Alumbaugh, unlike the Plaintiff in Hatton-Ward, claims injuries arising from the administrative process itself. Appellant Brief, pages 9-11. However, as stated above, this allegation is manifestly untrue. Alumbaugh's present claims derive solely from alleged wrongful conduct of her employer, specifically, in involuntarily transferring Alumbaugh, issuing her a derogatory performance appraisal, and excluding her from consideration for a promotion. Alumbaugh's administrative grievance procedure is not involved in this action.

Alumbaugh's argument on this point is particularly strong as to her claim under 42 USC Section 1983 because, as discussed within Alumbaugh's principal Brief, exhaustion of state administrative remedies is generally not required for

Section 1983 claims. See Brief of Appellant, pages 20-21, and cases cited therein.

II. THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIM UNDER 42 USC SECTION 1983.

Defendant's argument in relation to Alumbaugh's Section 1983 claim has changed considerably over the course of this action. Within its initial Memorandum in the District Court, Defendant's argument on this point was as follows:

Plaintiff alleges that defendant has violated her due process rights under 42 U.S.C. Section 1983 in breaching her contract of employment. However, the United States Supreme Court has recently held that 42 U.S.C. Section 1983 does not apply to states and their officials. In Will v. Michigan, 491 U.S. 58 (1989), the Court held that "neither a State nor its officials acting in their official capacities are 'persons' under Section 1983. Id. at 71. The result is that suit cannot be brought under Section 1983 against a State or its officials in their official capacity because the statute does not provide for a cause of action against parties other than "persons." Since defendant Utah State Insurance Department and Harold C. Yancey in his official capacity as Commissioner are improper parties in a Section 1983 action, plaintiff's Section 1983 action should be dismissed. (Emphasis added.) (R. 17.)

After Alumbaugh filed a responsive memorandum, in which she cited footnote 10 of the Will case, which essentially states that official-capacity actions against state officials for injunctive relief are permissible under Section 1983, Defendant filed a reply memorandum, wherein the sum of Defendant's argument on this point was as follows:

Plaintiff cites footnote 10 of the opinion in Will v. Michigan, 491 U.S. 58, 71 (1989) which notes an exception to the general rule that a State is not a person under 42 U.S.C. Section 1983. Will explains that "'official-capacity action for prospective relief are not treated as actions against the State.'" Id. (quoting Kentucky v. Graham, 473 U.S. 159, 167, n. 14 (1985)). Thus, injunctive relief against the State may be available under Section 1983, but damages are not available.

In the instant case, plaintiff's complaint does not seek prospective relief. Rather, plaintiff requests this Court to adjudicate whether the State violated her due process rights when she was transferred to another position of employment within the State agency. Plaintiff requests the following relief: (1) for reinstatement to the position of employment she would otherwise have had; (2) an injunction against further constitutional violations; (3) lost wages and benefits; (4) compensatory damages; (5) legal costs; and (6), attorneys fees. Because the relief plaintiff seeks against the State is unavailable under Section 1983, plaintiff's claim should be dismissed. (Footnote deleted, emphasis added.)

In its present Brief, Defendant apparently abandons the arguments which it raised in the District Court, and instead argues for the first time that Alumbaugh has failed to name Harold C. Yancey as a Defendant in his official capacity in this action.

Alumbaugh objects to this argument being made for the first time on Appeal. If Defendant had raised this issue in the District Court, any technical deficiency in Alumbaugh's Complaint could have been cured through a minor amendment.¹ Instead,

¹The District Court made no determination as to Defendant's argument under Section 1983. The District Court's decision was based exclusively upon the exhaustion of remedies issue. (R. 123-124.)

Defendant took the position in the District Court that Yancey had been named in his official capacity, and that the State of Utah could be a Defendant under Section 1983 for purposes of "prospective" injunctive relief.

Second, and more importantly, Alumbaugh's Complaint sufficiently states a claim against Yancey in his official capacity. The Complaint names as Defendant "Utah State Insurance Department, by and through its Commissioner and Authorized Representative, Harold C. Yancey." This designation sufficiently identifies Yancey as a Defendant in his official capacity. Alumbaugh may have more artfully distinguished between the State and its Official in her Complaint and subsequent documents, as could have the Defendant. Any confusion on this point may be due to the fact that actions against State officials are often construed as actions against the State itself. See Will, 491 U.S. at 71. Nevertheless, Yancey is specifically named as a Defendant in Alumbaugh's Complaint, which Complaint should be liberally construed in Alumbaugh's favor. Gill v. Timm, 720 P.2d 1352 (Utah 1986).

III. THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S STATE DUE PROCESS CLAIM.

Defendant argues on pages 14-17 of its Brief that Alumbaugh's claim for violation of her right of due process under

Article I, Section 7 of the Utah State Constitution should be dismissed for failure to comply with the notice and undertaking requirements of the Utah Governmental Immunity Act, UCA Section 63-30-12 and 13. Defendant admits on page 17, note 2 of its Brief that this issue was not raised in the District Court. The District Court clearly did not consider this issue in its Order of Dismissal. (R. 123-124.)

Defendant assumes without discussion that the Utah Governmental Immunity Act applies to Alumbaugh's claim under the Utah State Constitution. However, the Utah Supreme Court has recently held that the Governmental Immunity Act does not apply to claims which are based upon State constitutional provisions which are self-executing. Coleman v. Utah State Land Bd., 795 P.2d 622, 630-635 (Utah 1990). Much of the Supreme Court's lengthy analysis of Article 1, Section 22 of the Utah Constitution in Coleman is equally applicable to Alumbaugh's claim for deprivation of her property interest in employment under the Due Process Clause of the Utah State Constitution.

The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment is, with certain exceptions, self-executing. Bivens v. Six Unknown Named Agents

of Fed. Bur. of Narc., 403 U.S. 388, 91 S.Ct. 1999 (1971); Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264 (1979).²

Decisions of the Federal courts under the Due Process clauses of the Fifth and Fourteenth Amendments may be relied upon by the Utah courts in construing Article I, Section 7. Convalescent & Care Inst. v. Industrial Com'n, 649 P.2d 33 (Utah 1982); Untermeyer v. State Tax Com'n, 129 P.2d 881 (Utah 1942). In fact, a direct cause of action under the Utah Due Process Clause should be more readily available than under the Federal clauses because of the "Open Courts" provision of the Utah Constitution, Article I, Section 11, under which any alternative remedy must provide full relief to an injured person before it can abrogate an existing legal remedy. Condemarin v. University Hosp., 775 P.2d 348, 369 (Utah 1989).³

²Defendant relies upon Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404 (1983), wherein the United States Supreme Court held that a claim directly under the Due Process Clause of the Fourteenth Amendment was not available to a Federal Civil Service employee because of the alternative remedies provided by the Federal Civil Service laws. However, Bush is distinguishable from the present case because, unlike the Federal Civil Service laws, the Utah Grievance and Appeal Procedures Act contains no apparent remedies or enforcement mechanism. Therefore, the present case is more closely analogous to Davis v. Passman, supra.

³The effect of the Utah Governmental Immunity Act upon Federal Due Process claims was briefly considered by this Court in DeBry v. Salt Lake County, 835 P.2d 981, 987 (Utah App. 1992). However, the Court was not required to resolve this issue due to its affirmance of the trial court's determination that the Plaintiff's due process rights were not violated.

Moreover, claims for equitable relief are expressly excluded from the Utah Governmental Immunity Act by UCA Section 63-30-2(1), which defines "claim" as "any claim or cause of action for money or damages. . . ." See Bennett v. Bow Valley Development Corp., 797 P.2d 419, 424 (Utah 1990) and El Rancho Enterprises v. Murray City Corp., 565 P.2d 778 (Utah 1977). Therefore, Alumbaugh's claims for equitable relief are not subject to the Act.

Defendant argues in the alternative on pages 18-21 of its Brief that the Court should not allow a cause of action under Article I, Section 7 in the present case because of the alternative remedy which is provided by the Utah Grievance and Appeal Procedures Act. Defendant apparently concedes that, under Federal law, a direct cause of action under the Due Process clauses may be available in the absence of any other adequate remedy. However, Defendant argues under the authority of Bush v. Lucas, supra, at note 2, that such a cause of action should not be allowed in the present case because of the alternative remedies provided by the Utah Grievance and Appeal Procedures Act.

Defendant's argument fails to address Alumbaugh's argument that the Utah Grievance and Appeal Procedures Act contains no apparent remedies or enforcement mechanism. Alumbaugh briefed

this issue at length in the District Court (R. 96-102) and in her principal Brief, page 24, and Defendant has not disputed this point. In fact, the Jurisdictional Decision of the Career Service Review Board states in dictum that the Act contains no remedy for the injuries alleged by Alumbaugh. (R. 52-53.) It is apparent from an examination of the Act itself that it contains little, if any, in the way of remedies or enforcement. The Act should properly be construed as an optional procedure for facilitating negotiating and compromise, supplemental to any other remedies which may be available at law.

Finally, Defendant argues on page 21 of its Brief:

If, on the other hand, Ms. Alumbaugh claims that the statutes themselves do not afford adequate due process, she can challenge the constitutionality of the statutes by seeking judicial review of the administrative proceeding. Vance v. Fordham 671 P.2d 124 (Utah 1983).

Alumbaugh may have a claim that the Utah Grievance and Appeal Procedures Act violates Due Process if the Act is construed as Alumbaugh's exclusive remedy under State law. However, such a claim would be unrelated to the issues in the present case, which involve Defendant's violation of Alumbaugh's contractual property interest in her employment. Challenging the

Utah Grievance and Appeal Procedures Act would not provide a remedy for the injuries which Alumbaugh alleges in this action.⁴

IV. THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIM FOR BREACH OF CONTRACT.

Defendant argued in the District Court, and in its Brief at pages 21-24, that Alumbaugh has failed to state a claim for breach of an implied contract of employment arising from the Employee Handbook and Rules which have been published by the Utah Department of Human Resource Management.⁵ The District Court did not decide this issue, having based its decision exclusively on the exhaustion of remedies issue.

The essence of Defendant's argument is that, as a civil service employee, Alumbaugh's employment is governed by statute and not by contract. However, Defendant's argument misconstrues the nature of Alumbaugh's contract claims. Such claims are not based upon the civil service statutes, but upon the Employee Handbook and Rules published by the Utah Department of Human

⁴The constitutionality of the Utah Grievance and Appeal Procedures Act may be implicated in this action. Should the Court determine that the Act provides Alumbaugh's exclusive remedy, then the adequacy of the Act's remedies under Article I, Sections 7 and 22 is brought into issue under Alumbaugh's State Due Process claim.

⁵The specific provisions of the Employee Handbook and Rules relied upon by Alumbaugh were set forth verbatim in Alumbaugh's Memorandum in Opposition to Defendant's Motion to Dismiss, dated March 11, 1992, pages 6-13. (R. 30-37.)

Resource Management in accordance with its discretionary authority under the civil service statutes. There is no allegation in this case that the Employee Handbook or Rules are inconsistent in any way with the civil service statutes. Therefore, Alumbaugh may reasonably claim protection of both the civil service statutes and of an implied contract of employment, in accordance with Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

The Utah Supreme Court indirectly addressed this issue in Thurston v. Box Elder County, 835 P.2d 165 (Utah 1992). In Thurston, the Plaintiff alleged that the County had breached an implied contract of employment, arising from its Personnel Policies and Procedures Manual, in selecting the Plaintiff for a reduction-in-force ("RIF"). The District Court granted the County's Motion for Summary Judgment on the grounds that the County had not, as a matter of law, violated the procedures established by the Manual.

The Utah Supreme Court reversed the district court's dismissal of the breach of contract claim, holding that the Manual was required by statute to incorporate certain requirements regarding the criteria to be used in selecting employees for RIF. In so holding, the Supreme Court at least implied that a contract claim could arise from an employment

handbook or manual which is promulgated consistent with statutorily delegated duties.⁶

Alumbaugh submits that the present case is indistinguishable from Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981), wherein the Utah Supreme Court upheld a judgment in favor of the Plaintiff upon an implied contract claim arising from alleged violations of the College's Personnel Policies and Procedures. Defendant attempts to distinguish Piacitelli on the grounds that "Unlike Piacitelli, Dawn Alumbaugh is a merit employee, and her employment rights are therefore found in the statutes enacted by the legislature, and not in any alleged contracts." Defendant's Brief, p. 24.

In fact, Piacitelli's employment was subject to extensive statutory control pursuant to UCA Section 53B-3-101 et seq., which, inter alia, authorizes institution of higher education to enact regulations relating to employment. UCA Section 53B-3-103. Similarly, the Utah Personnel Management Act, UCA Section 67-19-1 et seq., authorizes the Director of the

⁶Defendant argues on page 23 of its Brief that the Thurston Court, sua sponte, reformulated the issue in that case from breach of contract to statutory construction. However, the Thurston Court actually construed the alleged contract consistently with the County's statutory duties. It is indisputable that the Thurston Court reversed the District Court's dismissal of the contract claim and, in so doing, implied that a breach of contract action arising from the Manual was available.

Department of Human Resource Management to promulgate rules regulating employee assignments, discipline and promotion. Pursuant to such authority, the Department of Human Resource Management has promulgated written Rules and an Employee Handbook which Alumbaugh alleges create an implied contract of employment. There is no principled basis for distinguishing between Piacitelli and the present case.

Many courts have held or stated that civil service employees may have contractual, as well as statutory rights. Hansen v. White, 947 F.2d 1378, 1380 (9th Cir. 1978); Longshore v. County of Venture, 157 Cal. Rptr. 706, 711 (Cal. 1979); Local No. 8 v. City of Great Falls, 568 P.2d 541, 545 (Mont. 1977); Wiles v. State Personnel Board, 121 P.2d 673, 676 (Cal. 1942); Helgevold v. Civil Service Com'n., 367 N.W.2d 257, 262 (Iowa App. 1985); Fugitt v. City of Placentia, 130 Cal. Rptr. 123, 129 (Cal. App. 1977). See generally, 15A Am.Jur.2d, Civil Service, Sections 47, 51 and 88.

Defendant cites numerous cases, including Lamborn v. Jessop, 631 P.2d 917 (Utah 1981) in support of its assertion that civil service employment is governed by statute and not by contract. However, all of the cases cited by Defendant, including Lamborn, involve alleged contractual rights which were in conflict with the controlling statutory provisions. Defendant has cited no authority which prohibits the Department of Human Resource

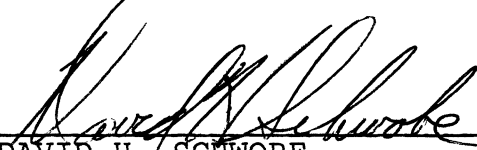
Management from creating contractual rights and duties which are consistent with and in addition to those created by the civil service statutes. There simply is no per se rule that a civil service employee may not be subject to an implied contract of employment of the type recognized in Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

CONCLUSION

For the reasons set forth herein and within Alumbaugh's principal Brief, dated January 13, 1993, Alumbaugh requests that the Order of Dismissal of the District Court be reversed and that this case be remanded to the District Court for further proceedings.

DATED this 15 day of April, 1993.

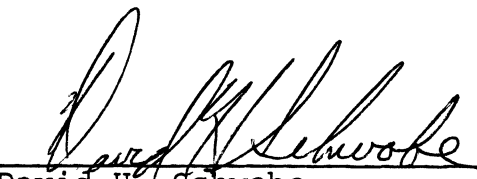
PERKINS, SCHWOBE & McLACHLAN



DAVID H. SCHWOBE
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was mailed, postage prepaid, to Brent A. Burnett, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 this 15 day of April, 1993.



David H. Schwobe